

KETUA PENGARAH KASTAM DAN EKSAIS & ANOR

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v.

PIONEER TECHNOLOGY (MALAYSIA) SDN BHD

COURT OF APPEAL, PUTRAJAYA

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ZAINUN ALI JCA

RAMLY ALI JCA

ABDUL WAHAB PATAIL JCA

[CIVIL APPEAL NO: W-01-404-2009]

3 JANUARY 2013

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REVENUE LAW: *Sales Tax - Assessment - Licensed manufacturing warehouse operating as manufacturer and distributor - Customs duty - Whether general expenses costs formed part of costs of production and sale pursuant to reg. 9(3) of Customs (Rules of Valuation) Regulations 1999 - Whether exemption under s. 65A(3)(b) of Customs Act 1967 obtained*

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The respondent had a factory licensed as a Licensed Manufacturing Warehouse ('LMW') pursuant to s. 65A of the Customs Act 1967 ('the Act'). Previously, the respondent 'sold' its goods for the home consumption *ie*, local market from the LMW to its sole distributor, Hwee Seng (Electronics) Sdn Bhd ('Hwee Seng'). In the customs declarations, the respondent was the 'exporter' and Hwee Seng was the 'importer'. The price that the respondent invoiced to Hwee Seng was accepted as the value of the 'imported' goods for the calculation of import duty and sales tax. Subsequently, the respondent began to sell to the local market through its own sales division in Kuala Lumpur and informed the Muar Customs and Excise Department ('Muar Customs') of the arrangement. Under this arrangement, the value of the goods stated for the purposes of import was the respondent's LMW's invoiced value to the respondent's sales division. A year later, the Muar Customs claimed that there had been an underpayment of customs duties by the respondent and stated that whilst the computed method was acceptable, the seller and buyer being the same entity, general expenses costs borne by the sales division outside the premises was part of the cost of production and sale pursuant to reg. 9(3) of the Customs (Rules of Valuation) Regulations 1999 ('CRVR'). In the High Court, it was decided that the profit and general expenses of the respondent's sales division could not be added to the ex-factory prices for the

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A purposes of determining customs value of the respondent's goods that were released for home consumption from the respondent's LMW. Hence, this appeal.

Held (allowing appeal with costs; setting aside order of High Court and dismissing cross-appeal)

B **Per Abdul Wahab Patail JCA delivering the judgment of the court:**

C (1) The arrangement such as that made by the respondent, to sell through its own sales division, was a departure from the usual manufacturer from an LMW as exporter selling to an importer. The alternative arrangement requires specific application for exemption to be made on the basis that the costs of administration and marketing for home consumption are purely local costs. Without the exemption under s. 65A(3)(b) of the Act, the customs duty will be calculated as if the goods had been imported. (para 15)

D (2) The concept of LMW is to provide a facility where a manufacturer can import free of customs duty raw materials and to export the manufactured goods. If the goods are sold for home consumption, the manufacturer is the exporter and the distributor for home consumption is the importer. Where the manufacturer is both exporter and importer, because it also sells for home consumption, in the words of s. 65A(3)(b) of the Act, the customs duty on such goods shall be calculated on the basis as if such goods had been imported. That means that the manufacturer operating an LMW is treated in the same position as an exporter of the goods selling into the home market in Malaysia. (para 13)

E (3) In such case, the computed value for the purposes of customs duty is as provided by the CRVR. Therefore, reg. 9 of the CRVR is applicable and it includes the payroll, marketing, administration and profits of the sales division. (paras 14 & 16)

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Bahasa Malaysia Translation Of Headnotes

I Responden memiliki sebuah kilang yang dilesenkan sebagai Gudang Pengilangan Berlesen ('GPB') menurut s. 65A Akta Kastam 1967 ('Akta'). Sebelum ini, responden 'menjual' barangannya bagi penggunaan tempatan iaitu pasaran tempatan dari GPB

kepada pengedar tunggalnya, Hwee Seng (Electronics) Sdn Bhd ('Hwee Seng'). Dalam deklarasi kastam, responden adalah 'pengeksporth' dan Hwee Seng adalah 'pengimport'. Harga yang diinvoiskan kepada Hwee Seng diterima sebagai nilai barangan yang 'diimport' bagi pengiraan duti import dan cukai jualan. Kemudian, responden mula menjual kepada pasaran tempatan melalui bahagian jualannya sendiri di Kuala Lumpur dan memberitahu Jabatan Kastam dan Eksais Muar ('Kastam Muar') mengenai pengaturan tersebut. Di bawah pengaturan ini, nilai barangan yang dinyatakan bagi tujuan import adalah nilai import GPB responden kepada bahagian jualan responden. Selepas setahun, Kastam Muar menyatakan bahawa mereka telah dikurang bayar duti kastam oleh responden dan menyatakan bahawa walaupun cara yang dikira boleh diterima, memandangkan penjual dan pembeli adalah dari entiti yang sama, kos perbelanjaan am yang dibelanjakan oleh bahagian jualan di luar premis adalah sebahagian kos pengeluaran dan jualan menurut peraturan 9(3) Peraturan-Peraturan Kastam (Kaedah Penilaian) 1999 ('PKKP'). Di Mahkamah Tinggi, diputuskan bahawa keuntungan dan perbelanjaan am bahagian jualan responden tidak boleh ditambah kepada harga sebelum pengilangan bagi tujuan menentukan nilai kastam bagi barangan responden yang dikeluarkan bagi penggunaan tempatan daripada GPB responden. Dengan itu, rayuan ini.

Diputuskan (membenarkan rayuan dengan kos; mengenyepikan perintah Mahkamah Tinggi dan menolak rayuan balas)

Oleh Abdul Wahab Patail HMR menyampaikan penghakiman mahkamah:

(1) Pengaturan seperti yang dibuat oleh responden, untuk menjual melalui bahagian jualannya sendiri, adalah penyimpangan daripada amalan biasa pengilang dari GPB sebagai pengeksporth menjual kepada pengimport. Pengaturan alternatif memerlukan permohonan spesifik untuk pengecualian yang dibuat atas dasar bahawa kos pentadbiran dan pemasaran untuk penggunaan tempatan adalah kos tempatan semata-mata. Tanpa pengecualian di bawah s. 65A(3)(b) Akta, duti kastam akan dikira seolah-olah barangan tersebut telah diimport.

(2) Konsep GPB adalah untuk memperuntukkan kemudahan yang mana pengilang boleh mengimport bahan-bahan mentah dan mengeksporth barangan perkilangan tanpa duti kastam. Jika barangan tersebut adalah untuk penggunaan tempatan,

- A pengilang adalah pengeksporth dan pengedar bagi penggunaan tempatan adalah pengimport. Apabila pengilang adalah pengeksporth dan pengimport, kerana menjual bagi penggunaan tempatan, dalam perkataan s. 65A(3)(b) Akta, duti kastam untuk barangan sedemikian akan dikira atas dasar seolah-olah
- B barangan tersebut telah diimport. Ini bermaksud bahawa pengilang yang beroperasi sebagai GPB dilayan dalam kedudukan yang sama seperti pengeksporth barangan yang menjual kepada pasaran tempatan di Malaysia.
- C (3) Dalam keadaan tersebut, nilai yang dikira bagi tujuan duti kastam adalah seperti yang diperuntukkan oleh PKKP. Dengan itu, peraturan 9 PKKP adalah terpakai dan ia termasuk gaji, pemasaran, pentadbiran dan keuntungan bahagian jualan.

Legislation referred to:

- D Customs Act 1967, s. 65A(3)(b), (4)
Customs (Rules of Valuation) Regulations 1999, regs. 4, 5, 7, 8, 9
- For the appellants - Nik Suhaimi Nik Sulaiman (Naziah Mokhtar with him); FCs*
- E *For the respondent - Chu Ai Li (Khor Xiou Shan with her); M/s Azman Davidson & Co*
- [Appeal from High Court, Kuala Lumpur; Originating Motion No: R2-25-36-2005]*
- F *Reported by S Barathi*

JUDGMENT

G Abdul Wahab Patail JCA:

[1] The Ketua Pengarah Kastam Dan Eksais and Kerajaan Malaysia (the appellants) had decided that in relation to payment of duties/taxes under the Customs Act 1967 and Sales Tax Act 1972 that:

- H 3.1 Kaedah penilaian bagi barangan berduti yang dibawa keluar dari Gudang Pengilangan berlesen syarikat Pioneer Technology (Malaysia) Sdn Bhd kepada 'Sales Division' nya di Kuala Lumpur hendaklah menggunakan Kaedah Campuran di mana bagi mencapai
- I nilai kastam melalui kaedah campuran tersebut hendaklah mengambilkira semua perbelanjaan am 'Sales Division' Syarikat Pioneer Technology (Malaysia) Sdn Bhd.

[2] The High Court, on 3 November 2009, allowed the appeal by Pioneer Technology (Malaysia) Sdn Bhd (the respondent) against that decision of the appellants. A

[3] The appellants appealed to this court.

Background B

[4] The respondent has a factory in Muar ("LMW") licensed as a Licensed Manufacturing Warehouse pursuant to s. 65A of the Customs Act 1967. The principal activity of the respondent is the manufacture of audio and video products and components and parts thereof. C

[5] The application of s. 65A(3)(b) means that if the respondent's goods are released from the LMW for the home consumption ie, local market, import duty and sales tax shall be calculated on the goods on the basis as if such goods have been imported. D

[6] Prior to 1 April 2000, the respondent "sold" its goods for the local market from the LMW to its sole distributor, Hwee Seng (Electronics) Sdn Bhd ("Hwee Seng"). In the customs declarations, the respondent was the "exporter" and Hwee Seng the "importer". The price the respondent invoiced Hwee Seng was accepted as the value of the "imported" goods for the calculation of import duty and sales tax. E F

[7] Subsequent to 1 April 2000, the respondent began to sell to the local market through its own sales division in Kuala Lumpur. The respondent informed the Royal Customs and Excise Department at Muar, Johor ("Muar Customs") of the arrangement and appended costs breakdown for the production costs of specific goods which also referred to as the ex-factory price. G

[8] Under this arrangement of "importing" by its sales division from its LMW, the value of the goods stated for the purposes of import was the respondent's LMW's invoiced value to the respondent's sales division. H

[9] A year later, after carrying out an investigation into the customs value declared by the respondent, the Muar Customs by letter 16 August 2001 claimed there had been an under payment of customs duties by the respondent. This was disputed by the respondent. By letter dated 16 September 2002, the Customs Headquarters in Kuala Lumpur stated that whilst the Computed I

- A** Method was acceptable, the seller and buyer being the same entity, general expenses costs borne by the sales division outside the premises (the LMW) is part of the cost of production and sale pursuant to reg. 9(3) of the Customs (Rules of Valuation) Regulations 1999 (“CRVR”). In other words, the value of the
- B** goods “imported” from the LMW would take into account general expenses of the respondent’s sales division. Therefore, payroll, marketing, administration and profits of the sales division would be added to the computed values submitted from the LMW.

C Issue

[10] From the foregoing, it is our view the High Court formulated the issue it had to address correctly:

- D** Whether, for purposes of determining customs value of the Respondent’s goods that are released for home consumption from the Respondent’s LMW in accordance with the computed value under Regulation 9 of the CRVR, the Appellants are entitled to include the Sales Division Profits and General Expenses (payroll, administration and marketing costs) to the ex-factory prices of the
- E** Respondent’s goods?

[11] The High Court decided that the profit and general expenses of the respondent’s sales division could not be added to the ex-factory prices for the purposes of determining customs value of the respondent’s goods that are released for home

F consumption from the respondent’s LMW.

Reasoning And Conclusion

- G** [12] Section 65A(3)(b) provides that subject to sub-s. (4) which does not apply in this case, if such goods are released from the warehouse for home consumption, the customs duty thereon shall be calculated on the basis as if such goods had been imported. The section does not contain the words “from the warehouse” or “from the warehouse licensed under s. 65”. Instead, there is a
- H** proviso that the Minister may, in any particular case, exempt any person from the payment of the whole or part of such duty which may be payable by such person on any such goods and in granting such exemption the Minister may impose such conditions as he may deem fit.

- I** [13] We observe also that the concept of the LMW is to provide a facility where a manufacturer can import free of customs duty raw materials and to export the manufactured goods. If the goods

are sold for home consumption, the manufacturer is the exporter and the distributor for home consumption is the importer. We conclude, therefore, where the manufacturer is both exporter and importer because it also sells for home consumption, the effect of s. 65A is that the goods sold for home consumption, then in the words of s. 65A(3)(b) the customs duty on such goods shall be calculated on the basis as if such goods had been imported. That means that the manufacturer operating an LMW is treated in the same position as an exporter of the goods selling into the home market in Malaysia.

[14] In such case, the computed value for the purposes of customs duty is as provided by the Customs (Rules of Valuation) Regulations 1999 PU(A) 507/1999.

[15] The arrangement such as that made by the respondent to sell through its own sales division is a departure from the usual manufacturer from an LMW as exporter selling to an importer. The alternative arrangements can vary greatly. Alternative arrangements present an issue of an infinite variety of cost, pricing and profit transfers that the Act requires specific application for exemption to be made. An exemption can be justified on the basis that the costs of administration and marketing for home consumption are purely local costs. The profits of the local sales division could similarly be exempted. But without such exemption being obtained under the proviso to s. 65A(3)(b), the customs duty of such of the goods released from the LMW to the warehouse will be calculated as if the goods had been imported.

[16] We sum up our conclusions as follows:

- (a) The LMW is a facility to allow a manufacturer to import raw materials without customs duty and to export free its products.
- (b) Where a manufacturer releases manufactured goods from the LMW for home consumption, the customs duty on the goods is calculated as if the goods had been imported.
- (c) That s. 65A(3)(b) does not provide any qualification to the phrase “had been imported” must mean the goods shall be treated as any other goods imported into Malaysia.
- (d) The rules of valuation of customs value provide that the primary basis of determination of customs value of imported goods is their transaction value: see reg. 4. Thus, where the

- A** goods are sold by the exporter to an importer distributor, the transaction value is the invoice value with the adjustments under reg. 5.
- B** (e) Where a manufacturer from an LMW sells to home consumptions he may seek exemption on that ground from the Minister.
- (f) Where such manufacturer has no exemption, the customs value is the transaction value as above.
- C** (g) Where such manufacturer has no exemption, and no transaction value the customs value is to be determined under regs. 7, 8 or 9 as applicable.
- D** (h) Regulation 9 is applicable in this case, and it includes the payroll, marketing, administration and profits of the sales division.

E [17] We, therefore, allowed the appeal with costs, and set aside the order of the High Court. In the circumstances, the cross appeal by the respondent in respect of interest for the prejudgment period must fall. We, therefore, dismissed the cross appeal.

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